Office - Supreme Court, U. S.
FILED
DEC 20 1943
CHARLES ELMORE CROPLEY

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1943.

No. 551

CURACAO TRADING CO., INC.,
*Petitioner,*

against

FEDERAL INSURANCE COMPANY,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THEODORE E. WOLCOTT,
*Counsel for Petitioner,*
60 East 42nd Street,
New York City.

ACKERMAN PRESS, Inc., 202 East 44th St., Phone VAnderbilt 6-1898

## INDEX.


| | PAGE |
|---|---|
| Petition | 1 |
| Summary Statement Of The Matters Involved | 2 |
| The Decision Below | 6 |
| Jurisdiction | 7 |
| Questions Presented | 8 |
| Reasons For Granting The Writ | 8 |
| Brief | 10 |
| Opinions Below | 10 |
| Jurisdiction | 10 |
| Statement Of The Case And Questions Presented | 10 |
| Specification Of Assigned Errors | 10 |
| Argument | 12 |
| POINT I.—The issues as to the validity of the warehouse receipts and the ownership of the cocoa beans were substantial issues of fact. The proof presented by the respondent and accepted by the Court was inadmissible and contradicted | 12 |
| POINT II.—The reclamation proceeding orders are not binding on petitioner and are inadmissible | 14 |
| POINT III.—The nature and extent of agency of Stake to enter into an insurance contract on behalf of Federal Insurance Company and make representations with respect thereto are issues of fact, particularly where, as the Court below found, there is substantial documentary as well as oral proof submitted in support of petitioner's allegations | 15 |
| POINT IV.—The nature of the insurance contract and the meaning of "non-delivery" could only be determined in light of the surrounding circumstances, particularly where the intended meaning and coverage of "non-delivery" had been agreed upon by the parties and relied upon by the petitioner in risking $110,000 | 17 |
| Conclusion | 21 |

## TABLE OF CASES.


PAGES

*Aetna Casualty & Surety Co.* v. *National Bank of Tacoma*, 59 F. (2d) 493 ..... 17, 18
*Aetna Ins. Co.* v. *Willys Overland, Inc.*, 288 F. 912 ..... 15
*Amory* v. *Gilman*, 2 Mass. 1 ..... 19
*Aldrich* v. *New York Life Ins. Co.*, 235 N. Y. 214 ..... 17

*Berry* v. *A. C. Ins. Co.*, 132 N. Y. 49 ..... 20
*Bowman* v. *Loperena*, 311 U. S. 262 ..... 7
*Brown* v. *Fletcher's Estate*, 210 U. S. 82 ..... 15
*Buck* v. *Chesapeake Ins. Co.*, 1 Pet. 151 ..... 20
*Bushey & Sons* v. *American Ins. Co.*, 237 N. Y. 24 ..... 17

*Coleman* v. *Eyre*, 45 N. Y. 38 ..... 18
*Columbian Ins. Co.* v. *Lawrence*, 2 Pet. 25; 10 Pet. 507 ..... 19, 20
*Compania de Navagacion* v. *Insurance Co.*, 277 U. S. 66 ..... 17
*Corporation of Royal Exchange Assurance* v. *United States*, 75 F. (2d) 478 ..... 18
*Craufurd* v. *Hunter*, 8 D. & D. 13 ..... 20
*Cummings* v. *Ins. Co.*, 55 N. H. 457 ..... 19

*Driggs* v. *Dean*, 167 N. Y. 121 ..... 12

*Empire Development Co.* v. *Title Guarantee & Trust Co.*, 225 N. Y. 53, 121 N. E. 468 ..... 20
*Etting* v. *Bank*, 11 Wheat. 59 ..... 13

*Fireman's Fund Ins. Co. of Cal.* v. *Vinton*, 190 N. Y. S. 525 ..... 17

*Garelick* v. *Rosen*, 274 N. Y. 64 ..... 17
*Golden* v. *Romer*, 20 Hun 438 ..... 12
*Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498 ..... 7

*Herrman* v. *New England Navigation Co.*, 143 App. Div. 551 ..... 12
*Hoffman* v. *Aetna Ins. Co.*, 32 N. Y. 405 ..... 17
*Hooper* v. *Robinson*, 98 U. S. 528 ..... 20

*Ingersoll* v. *Coram*, 211 U. S. 335 ..... 15

PAGES

*Johnson* v. *Lutz*, 253 N. Y. 124 ..... 14

*Kittredge* v. *Grannis*, 236 N. Y. 375 ..... 14

*Little & Christman* v. *General Ins. Co. of America*, S. D. N. Y., Civ. 8-500 ..... 14

*Lucena* v. *Craufurd*, 2 Bos. & Pul. 269 ..... 20

*Maryland Casualty Co.* v. *Washington Loan & Banking Co.*, 145 S. E. 761, 61 A. L. R. 331 ..... 20

*Merchants National Bank* v. *Roxbury Distributing Co.*, 196 F. 76 ..... 12

*National Bank of Tacoma* v. *Aetna Casualty & Surety Co.*, 296 Pac. 831 ..... 18

*Nat'l Filtering Oil Co.* v. *Citizens' Ins. Co.*, 106 N. Y. 535 ..... 20

*Nellis* v. *Western Life Indemnity Co.*, 207 N. Y. 320 ..... 17

*Nickelson* v. *Nestles Milk Products Corp., Inc.*, 107 F. (2d) 17 ..... 14

*Norris* v. *Alliance Ins. Co. of Phila.*, 123 A. 762 ..... 17

*Ohio Cas. Ins. Co.* v. *Callaway*, 134 Fed. (2) 788 ..... 16

*Palmer* v. *Hoffman*, 318 U. S. 109 ..... 14

*Phoenix Ins. Co.* v. *Erie Transportation*, 117 U. S. 312 ... 20

*Provident Trust Co.* v. *Nat'l Surety Co.*, 44 F. Supp. 514 ..... 20

*Pritchard* v. *Com. Fire Ins. Co.*, 203 S. W. 244 ..... 16

*Rohrbach* v. *Germania Fire Ins. Co.*, 62 N. Y. 47 ..... 20

*Ryan* v. *United States*, 19 Wall. 514 ..... 18, 20

*Saverese* v. *Hartford Fire Ins. Co.*, 123 A. 763 ..... 17

*Stock* v. *Inglis*, 12 Q. B. 564 ..... 20

*Strochmann* v. *Mutual Life Ins. Co.*, 300 U. S. 435 ..... 17

*Traders Ins. Co.* v. *Newman*, 120 Ind. 544, 22 N. E. 428 19

*Troxell* v. *Delaware, Lackawanna & Western Railroad Co.*, 227 U. S. 443 ..... 15

*United States* v. *Seminole Nation*, 299 U. S. 417 ..... 7

*West* v. *Smith*, 101 U. S. 270 ..... 13

## STATUTES AND AUTHORITIES CITED.

PAGES

*Cooley's Briefs on Insurance*, Vol. 1 ..... 19

*Judicial Code*, Section 240 (a) as amended by the Act of February 13th, 1925, Chapter 229, Section 1, 43 Stat. 938 (U. S. C. A., Title 28, Section 347 [a]) ..... 7

*New York Insurance Law*, former Sec. 169 ..... 20

# Supreme Court of the United States

OCTOBER TERM, 1943.

---

CURACAO TRADING CO., INC.,

*Petitioner,*

against

FEDERAL INSURANCE COMPANY,

*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

*To The Honorable Chief Justice And Associate Justices Of The Supreme Court Of The United States:*

Your petitioner, Curacao Trading Co., Inc., prays that a writ of certiorari issue to review the decision and judgment of the United States Circuit Court of Appeals for the Second Circuit, entered on August 18, 1943, affirming a judgment of the United States District Court, for the Southern District of New York, granting respondent's motion for summary judgment under Rule 56 and dismissing the complaint on the merits.

Petition for rehearing by that Court was denied on September. 22, 1943, on which day the order and judgment was entered.

## Summary Statement Of The Matters Involved.*

This is an action by the petitioner, Curacao Trading Co., Inc. ("Curacao"), on its own behalf and as assignee of the Grace National Bank ("Bank") against respondent, Federal Insurance Company ("Federal"), upon a contract of insurance, both oral and written to cover certain risks arising out of a loan transaction involving warehouse receipts for cocoa beans as collateral security, in which it is alleged that petitioner relying upon such insurance as primary security upon notice to that effect to respondent proceeded with the deal and suffered a loss of $110,000 arising out of risks covered.

## The Facts.

Petitioner is engaged in the business of exporting and importing commodities, including cocoa beans (624). The respondent, "Federal", is a New Jersey insurance company, licensed and authorized to do business in the State of New York (625). William A. Stake & Co. ("Stake") is a corporation duly licensed as an insurance broker and insurance agent. For many years petitioner had purchased insurance from respondent through Stake, who acted as agent for Federal (99-105). The insurance with respondent, among which was an open import policy #0-54711 issued in 1935 (Complaint, Ex. E, Tab 27, to which many indorsements were thereafter added; Tabs 40-66) premiums paid by appellant to respondent amounted to more than $90,000; Stake and Federal were experienced in the field of insurance and were relied upon by the appellant as such and were familiar with appellant's business and insurance requirements (101, 217).

*Figures in parentheses refer to folio numbers in the record. Emphasis wherever the same appears is our own. Upon stipulation, printing of most of the exhibits was dispensed with. They will be found in a separate *Exhibit Volume* in which the exhibits are additionally identified with numbered tabs.

Immediately prior to the 31st day of March, 1939, the petitioner conferred with the respondent, through its agent, Stake (by its vice-president, James Christie), and informed it that petitioner was contemplating entering into a deal whereby petitioner was to do certain financing in an amount of approximately $90,000; it wanted to find out from respondent whether it would supply all of the insurance protection and coverage petitioner needed to fully secure itself and its bank.

The projected deal as outlined to the respondent was as follows.

Petitioner was to advance a sum of about $90,000 to a third party, Garcia Sugars Corporation ("Garcia") and receive therefor certain warehouse receipts (Tabs 23, 24, 25) providing for the delivery of cocoa beans, which receipts were to be issued by Harbor Stores Corporation ("The Warehouse"); that petitioner would sell on the New York cocoa Exchange for the account of Garcia, the equivalent quantity of cocoa for future delivery (628). Garcia was to liquidate such sales in the months hedged, and in default thereof, petitioner was to tender and deliver cocoa beans to comply with said future delivery contract. The petitioner in turn was to obtain the funds from its bank, the Grace National Bank ("The Bank"), and pledge as collateral security therefor the warehouse receipts and the insurance policy or other evidence of insurance that it would receive from the respondent (708-711; 87-93; 205-211, 221).

Petitioner stated to respondent that it had no knowledge, opinion or belief as to the reliability of the warehouse, the validity of the warehouse receipts, the title of the warehouse to the cocoa beans, the honesty of the warehouse, the ownership of the cocoa beans or other interest therein of Garcia, and further that it had been rumored that Garcia had an interest in Insular Terminal Corporation, the predecessor of Harbor Store Corporation, the owner of

the warehouse, and that petitioner wanted to be insured against all risks and liabilities that petitioner was exposed to in the transaction including the obligation of the warehouse to deliver the beans pursuant to the warehouse receipts, otherwise it would not enter into the deal.

After consultation between Christie and Bonner (underwriter of respondent) in which Christie fully informed Bonner of the nature of the insurance petitioner required (208-211; 226-237), the respondent thereupon represented, agreed and warranted that appellant would be and was fully covered against any and all risks including those aforementioned, and stated that the appellant could go ahead with the deal and could rely upon the fact that it had full insurance protection of the aforementioned risks; that if the beans were not delivered to petitioner, then petitioner would be protected (210-212, 221; 87-92). It stated that when the insurance policy or certificate was issued, it could be delivered to the bank and that both the appellant and the bank could rely upon it as evidence of the insurance security (87-92; 207, 329, 331); and that all that remained to be done was for the appellant to furnish the respondent with a description of the warehouse receipts and the amount of the loan (205-207; 237); the respondent issued a certificate of insurance (Tab 26) to be given to the bank (211) as evidence of the "pre-attachment of the insurance" (222), and as its security (178). (It should be noted that the form of the insurance was to be selected by respondent.)

The petitioner relying upon the foregoing, entered into an agreement in writing with Garcia (762), obtained the warehouse receipts which were issued directly by the warehouse to plaintiff (Exs. A, B and C of Complaint, Tabs #23, 24 and 25) and in exchange for a loan of $90,000.00 delivered them to the bank together with a certificate of insurance issued and countersigned by Stake on behalf of respondent (Ex. D of Complaint, Tab #26), and gave

the bank a trust receipt for the warehouse documents (Ex. C, Tab #38). Petitioner then made contracts for the future delivery in September of the cocoa beans to third parties (94).

About May 24, 1939, an involuntary petition in bankruptcy was filed against Garcia in the District Court. Garcia was adjudicated a bankrupt on or about the 7th day of June, 1939 (645), and wholly failed to perform its agreement and failed to liquidate the future delivery contracts (646). Harbor Stores Corporation after a voluntary petition, was adjudicated a bankrupt on or about May 31, 1939 (648). Demand for the delivery of the cocoa beans was made, pursuant to the warehouse receipts, and delivery refused (648-649).

On or about June 15, 1939 petitioner filed a petition for reclamation in the warehouse bankruptcy proceedings, seeking delivery from the receivers of 18,480 bags of cocoa beans, which petition was dismissed on or about August 8, 1939 (650). Petitioner in the meantime repaid the bank and became subrogated to its rights by way of assignment.

The petitioner being unable to fulfill its future delivery obligations was under the rules of the New York Cocoa Exchange (743) obliged to repurchase such future delivery contracts and suffered a loss amounting in all to $109,647.18 (95; 645).

Respondent's claim is lack of insurable interest in that petitioner at the time of the insurance contract herein did not own an interest in the cocoa beans and that the warehouse receipts were not validly issued. This defense not only raises issues of fact, but is not as broad as the insurance contract sued upon.

## The Decision Below.

The Court below affirmed on the ground that the insurance contract was one for property insurance only and that petitioner did not own the cocoa beans insured and therefore had no insurable interest. The Court below erroneously treated petitioner's claim as based upon alleged insurance of spurious warehouse receipts. But petitioner does not claim or admit the receipts were spurious but claims that the warehouse failed to deliver the beans on demand, and therefore respondent is liable. The respondent's contention of non-ownership and spurious receipts at most created issues of fact.

However, as was stated to the Court below, regardless of whether the insurance covered property, property rights or contract rights or obligations, material issues of fact were involved that were fundamental, and until these basic conflicts were resolved by a complete jury trial, as was petitioner's right, there could be no fair and valid determination of this action.

These material issues of fact involved:

1. The validity of the warehouse receipts.

2. The ownership of the cocoa beans.

3. The nature and extent of agency of Stake with respect to Federal.

4. The construction of the word "non-delivery" in the insurance certificate in light of the surrounding circumstances and the intent of the parties.

5. The representations and warranties made by Stake on behalf of Federal.

The decision of the Court below rests upon (a) disregard of the presumptive validity of the warehouse receipts; (b)

## Questions Presented.

1. Are there issues of fact presented which may not be determined by the Court on affidavits alone on a motion for summary judgment?

2. Was the finding that the warehouse receipts were invalid based upon inadmissible evidence? Apart from the question of inadmissibility, was this finding drawn from conflicting evidence?

3. Was the finding that the plaintiff did not own the cocoa beans at the time of the making of the insurance contract herein (or at any time) based on inadmissible evidence? Apart from inadmissibility, was this finding drawn from conflicting evidence?

4. Was the reclamation order res adjudicata and binding on the petitioner herein?

5. Was the interpretation of the meaning of the word "non-delivery" a question of fact to be determined by a jury in the light of surrounding circumstances and the orally expressed agreement and intent of the parties as to its meaning?

6. Did plaintiff have an insurable interest regardless of the ultimate ownership of the beans because of its undisputed financial risk in the transaction?

## Reasons For Granting The Writ.

The Court below has arbitrarily assumed powers to decide conflicting issues of fact which were not granted to it under the Federal Rules of Civil Procedure and are prohibited by the Constitution of the United States. In doing this it has disregarded fundamental rules of interpretation of insurance contracts to the effect that surrounding circumstances should be inquired into in order to interpret the meaning of a phrase and to determine the nature of the insurance contract.

The Court in doing this has also ignored the well established rule of *contra proferentem*. In the same manner the Court below has resolved issues of fact as to the nature and extent of the agency of Stake. The procedure of the Circuit Court rested upon further fundamental errors in receiving into evidence inadmissible matter which were hearsay and contradicted by the same witness or affiant. The determination of the Circuit Court of Appeals is in conflict with the decisions of this Court and of various other Circuit Courts of Appeal as well as of the Courts of the State of New York as will be shown in our brief.

It is respectfully submitted that the Court below has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by the lower Court as to call for the exercise of this Court's power of supervision.

We believe the summary disposition of this case in the lower Courts is symptomatic of a misinterpretation of Rule 56 and of a trend to "trial by affidavit" and unless this present trend in the Federal Courts is checked, the Federal Courts of justice will become increasingly summary and administrative rather than plenary and judicial as is required by our Constitution. The questions here presented are novel and of extreme importance to the business and insurance world.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to the Circuit Court of Appeals before the Second Circuit should be granted.

Respectfully submitted,

CURACAO TRADING CO., INC.,
By THEODORE E. WOLCOTT.

THEODORE E. WOLCOTT,
Counsel for Petitioner.

Dated, New York, December 10, 1943.

## BRIEF IN SUPPORT OF PETITION.

### Opinions Below.

The opinion of the United States District Court for the Southern District of New York, appears at page 268 of the record.

The opinion of the Circuit Court of Appeals for the Second Circuit appears at last pages of the record and is reported in 137 Fed. (2d) 911.

### Jurisdiction.

Statement as to jurisdiction is made at page 7 of the petition.

### Statement Of The Case And Questions Presented.

A summary of the statement of the case and the questions presented is set forth in the petition.

### Specification Of Assigned Errors.

It is intended by the petitioner to urge the assignments of error filed in the lower Court (584-591) and presented in the petition. In substance these assignments include the following:

1. It was error to deny petitioner's demand for common law proof of all of the issues herein (584);

2. It was error to admit over petitioner's objection the affidavit of McMackin as to the ownership of the beans and

validity of the warehouse receipts, in violation of the hearsay rule and for which no proper foundation had been laid.

3. It was error of the Court below to usurp the function of the jury and to resolve the issues of fact as to petitioner's ownership of the beans and the validity of the warehouse receipts.

4. It was error to admit over petitioner's objections, the reclamation order in bankruptcy, since it was not res adjudicata.

5. It was error of the Court to usurp the function of the jury and to resolve questions of fact which were raised by the facts and circumstances surrounding the transaction as to:

(a) the nature and extent of the agency of Stake to act on behalf of Federal;

(b) the meaning of "non-delivery" as used by the parties;

(c) the insurance coverage.

## ARGUMENT.

### POINT I.

**The issues as to the validity of the warehouse receipts and the ownership of the cocoa beans were substantial issues of fact. The proof presented by the respondent and accepted by the Court was inadmissible and contradicted.**

Appellant's proof of ownership and interest in the cocoa beans was substantial. It rested upon documentary proof (warehouse receipts), affidavits, warehouse records. The appellant was estopped to dispute appellant's ownership, interest in the cocoa beans or validity of the warehouse receipts.

The Courts below disregarded the presumptive validity of the warehouse receipts which upon their face showed the appellant to be the owner or party interested in the cocoa beans. Appellant was not an endorsee of the receipts. They were duly made out to appellant by John J. McMackin, Secretary of Harbor Stores Corporation, against 18,480 bags of cocoa beans in the warehouse answering the description in the receipts at which time the inventory records showed that Garcia had over 90,000 bags of cocoa beans in the warehouse (McMackin, 593-595; Kehrer, 172).

The warehouse receipts are prima facie proof of ownership (Driggs v. Dean, 167 N. Y. 121), the burden to prove that petitioner was not the owner of the cocoa beans was upon the respondent.

In Merchants' National Bank v. Roxbury Distributing Co., 196 F. 76 (D. C., Md.), the Court held that the holder of a warehouse certificate is the owner of the goods described in the certificate. Golden v. Romer, et al., 20 Hun 438 (N. Y.); and Herrman v. New England Navigation Co., 143 App. Div. 551 (N. Y.).

The validity of the warehouse receipts is a question of fact for the jury.

In *Etting* v. *Bank*, 11 Wheat. 59, Chief Justice Marshall, for the Court, declared the law thus:

> "Although it is the province of the court to construe written instruments, yet when the effect of such instruments depends, not merely on the construction and meaning of the instrument, but upon collateral facts in pais, and extrinsic circumstances, the inferences of fact to be drawn from them are to be left to the jury." See also West v. Smith, 101 U. S. 270.

Respondent's claim of non-ownership on the part of appellant rested upon inadmissible, incompetent and insufficient evidence. It rested upon McMackin's affidavit (440-476) and upon the orders in the reclamation proceeding. As the record shows (525-606), the respondent, McMackin's affidavit was entirely hearsay, was not made on the personal knowledge of McMackin, was a purported resume of alleged records which were not offered in evidence, and accordingly was not the best evidence. There was no proof that the records were kept in the regular course of business, that McMackin had any knowledge of the same, that they were kept under his direction and control, or that he knew anything about their accuracy.

On the other hand, a few days later the same McMackin (who had issued the warehouse receipts to the petitioner over his own signature), by means of another affidavit (591), contradicted his first affidavit on every point and stated that the records were not made up by him or in his presence or under his supervision and that "I have no personal knowledge of how they were made up nor do I have any knowledge of their accuracy" and that he had no duties with respect to the records which were kept at the warehouse in Long Island City whereas he was stationed in the Manhattan office of the warehouse corpora-

tion. Furthermore, no proper foundation was laid for the introduction of these records in evidence. As a matter of fact they were never offered in evidence. Yet the finding of the Court below rests upon records which were not even before the Court. It is most respectfully submitted that the ruling of the Court below on this point is in direct conflict with well settled law and more particularly with the decision of this Court in *Palmer* v. *Hoffman*, 318 U. S. 109.

The decision of the Court below on the foregoing points is in conflict with the decisions aforecited as well as the following:

Kittredge v. Grannis, et al., 236 N. Y. 375.
Johnson v. Lutz, et al., 253 N. Y. 124, 128.
Nickelson v. Nestles Milk Products Corp., Inc., 107 F. 2d 17 (5th Circuit).

## POINT II.

**The reclamation proceeding orders are not binding on petitioner and are inadmissible.**

The respondents stressed the reclamation orders (477-518) to show that petitioner had no insurable interest. But the reclamation order spoke as of the time of the bankruptcy and not as of the time of the issuance of the insurance months earlier.

Furthermore, in the case of *Little & Christman* v. *General Ins. Co. of America*, S. D., N. Y. Civ. 8-500, which arose out of the Garcia and Harbor Stores warehouse bankruptcies, Judge Hulbert held that an even more stringent reclamation order denying Little & Christman's claim for certain sugar based on warehouse receipts was not binding on Little & Christman in its action against the insurance company. This is in accord with basic law and

with the decisions of this Court holding that where there is no identity of subject and parties a prior order or judgment is not res adjudicata. *Brown* v. *Fletcher's Estate*, 210 U. S. 82; *Ingersoll* v. *Coram*, 211 U. S. 335; *Troxell* v. *Delaware, Lackawanna & Western R. R. Co.*, 227 U. S. 443. Although the Court below in its opinion, noted the resettled reclamation proceeding order, it made no comment.

## POINT III.

**The nature and extent of agency of Stake to enter into an insurance contract on behalf of Federal Insurance Company and make representations with respect thereto are issues of fact, particularly where, as the Court below found, there is substantial documentary as well as oral proof submitted in support of petitioner's allegations.**

The insurance certificate was an independent policy, *Aetna Ins. Co.* v. *Willys Overland, Inc.*, 288 Fed. 912 (N. D., Ohio), and admittedly depended for its validity upon the countersignature of Stake. Stake admitted (213) that for a period of many years prior to the transaction herein, it kept a set of certificate forms on its premises which had been given to it by respondent. (A full set of these forms is set out in Tab #3 of the exhibit book.) The Court's attention is directed to the completely blank appearance of these forms. Nothing is said as to the insured, coverage, perils, risks, etc. The forms on their lower right-hand sides bear the original signature of respondent's managers. In other words, as far back as 1933 respondent gave Stake a blank check (231).

This blank check authority by respondent (a foreign insurance company) to Stake, its resident agent, to fill in the terms and conditions and generally all of the typewritten matter appearing in the certificate, and to countersign is very broad authority indeed. It necessarily car-

ries with it a great amount of discretion and the authority to explain as well as to fix its terms and conditions.

As was said in *Pritchard* v. *Connecticut Fire Ins. Co.*, 203 S. W. 244:

> "Defendant makes the point that the only power conferred upon its agents at Nevada was the power to solicit applications for insurance, and to submit them to the company for approval before any insurance became binding upon the company; that the agents could not bind the company by a verbal contract of insurance. This point is not well taken. It was said by this court in *Sheets and Day* v. *Insurance Co.*, 153 Mo. App. 633, 135 S. W. 84:
>
> > 'We are not saying that a foreign insurance company may not employ soliciting agents of limited powers in this state, but we are holding that countersigning resident agents are presumed to possess authority to make contracts of insurance for their principals.' "

To same effect: *Ohio Casualty Ins. Co.* v. *Callaway*, 134 Fed. (2) 788 (C. C. A. 10).

Prior course of dealing shows Stake as agent of respondent with the broadest powers (324-27).

The respondent through Bonner was directly and fully informed of the nature of the discussions, the insurance coverage given (210, 211, 212, 215-6, 221, 276, 338).

## POINT IV.

**The nature of the insurance contract and the meaning of "non-delivery" could only be determined in light of the surrounding circumstances, particularly where the intended meaning and coverage of "non-delivery" had been agreed upon by the parties and relied upon by the petitioner in risking $110,000.**

In *Compania de Navagacion* v. *Insurance Co.*, 277 U. S. 66, 80, this Court speaking of an insurance contract said:

> "Its construction was affected necessarily by the special circumstances surrounding the contract known to both parties and counted on by them. * * *"

This identical principle is applied also in:

*Strochmann* v. *Mutual Life Insurance Company*, 300 U. S. 435;
*Aldrich* v. *New York Life Insurance Company*, 235 N. Y. 214;
*Nellis* v. *Western Life Indemnity Co.*, 207 N. Y. 320;
*Bushey & Sons* v. *American Insurance Company*, 237 N. Y. 24;
*Matter of Garelick* v. *Rosen*, 274 N. Y. 64.

Similar is *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma*, 59 F. (2d) 493 (C. C. A. 9).

Appellant submitted uncontradicted proof that appellant had actual and constructive possession of the cocoa beans (97, 177). This was an issue of fact. *Driggs* v. *Dean*, 167 N. Y. 121. The importance of this point is that it is well settled that regardless of whether or not the insured was the owner of the goods, as long as he had possession, he had insurable interest. *Fireman's Fund Ins. Co. of Cal.* v. *Vinton*, 190 N. Y. Supp. 525; *Norris* v. *Alliance Ins. Co. of Phila.*, 123 A. 762; *Saverese* v. *Hartford Fire Ins. Co.*, 123 A. 763.

"Non-delivery" has nothing to do with ownership or existence of goods. The mere failure to deliver is sufficient. At the outset, it should be noted that petitioner was already insured against physical risks, such as fire, theft, sprinkler damage, etc.

This was a risk wholly apart from and having nothing to do with the physical perils. By contract it was peculiarly a risk of default by the warehouseman—its "failure * * * to perform the contract." (*Corporation of Royal Exchange Assurance* v. *U. S.*, 75 F. (2d) 478 (C. C. A. 2), 480.)—whatever the reason.

In *National Bank* v. *Aetna Casualty & Surety Co.*, 296 Pac. 831 (Sup. Ct., Wash., 1931), there was the following set up. The defendant insurance company issued an indemnity bond binding themselves and the Wood Pipe Company to the Twin Harbors Company for any damages claimed or suffered for lack of delivery of the materials within the time called for. Upon receipt of these papers the bank loaned the Wood Pipe Company a large sum of money. The bank recovered on the bond, the Court stating that the insurance was not to be considered as on specific goods which were non-existent but rather was to indemnify the insured against loss for failure to deliver the order.

This case was relitigated in the Federal Courts in 1932, *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma*, 59 F. (2d) 493, where the insurance company was again held liable. See also *Ryan* v. *U. S.*, 19 Wallace 514.

The Court has before it a business transaction in which the petitioner has been exposed to certain risks. It is basic that a risk of loss may be shifted to another in consideration of a payment of a premium (*Coleman* v. *Eyre*, 45 N. Y. 38). This principle has always remained the same (*Restatement of the Law of Contract*, Ch. 18, Sec. 520). But the risks have multiplied as trading and commerce have developed and the needs of business, particularly in modern

times, have become more complex and varied. Insurance is always broad enough to cover the business need. The law has placed but one limitation upon an insurance contract; i. e., that it cannot be a mere wager. This limitation was placed thereon for reasons of public policy. However, under common law, insurable interest was not necessary in Marine Insurance (*Cooley*, Vol. 1, p. 90, citing *Amory* v. *Gilman*, 2 Mass. 1).

### Insurance Is Indemnity Against Loss.

As stated in 1 Cooley, 7, 114-115: "The dominant feature of the contract is to grant indemnity or security against loss by reason of the risk (*Everley* v. *Equitable Surety Co.*, 190 Ind. 274, 130 N. E. 227). The contract may indemnify against any sort of risk so long as it is not a 'mere cover for a wager' (*Empire Development Co.* v. *Title Guarantee & Trust Co.*, 225 N. Y. 53, 121 N. E. 468)."

As Cooley, therefore, concludes (p. 143) and the authorities uniformly recognize, the general rule is that "whenever * * * the impairment or breach of any right, duty or obligation, would result in a diminution of estate, an interest in such * * * right, duty, or obligation is a proper subject of insurance" (1 Arnould 438).

It is the financial stake of the person rather than property that is insured against loss. "It is not an insurance of the specific thing which is the subject of the insurance." (*Cooley Briefs on Insurance*, Vol. 1, p. 116, citing *Columbian Ins. Co.* v. *Lawrence*, 10 Pet. 507, 9 L. Ed. 512.) See also: *Traders Insurance Company* v. *Newman*, 120 Ind. 544, 22 N. E. 428. *Cummings* v. *Insurance Co.*, 55 N. H. 457.

The test is risk of loss, as stated by Chief Justice Marshall, in the leading case of *Columbian Ins. Co.* v. *Lawrence*, 2 Pet. 25, at 46-47:

"That an equitable interest may be insured is admitted. We can perceive no reason which excludes an interest held under an executory contract. While the contract subsists, the person claiming under it has undoubtedly a substantial interest in the property. If it be destroyed, the loss, in contemplation of law, is his." *Phoenix Ins. Co.* v. *Erie Transportation Co.*, 117 U. S. 312, 323; *Rohrbach* v. *Germania Fire Ins. Co.* (supra); *Nat'l Filtering Oil Co.* v. *Citizens' Ins. Co., supra; Lucena* v. *Craufurd*, 2 Bos. & Pul. (N. S.) 269, 127 Eng. Rep. full reprint 630, 639. *Hooper* v. *Robinson*, 98 U. S. 528.

The *New York Insurance Law*, Sec. 169, which was in effect at the time of the transaction herein recognized the doctrine of the aforecited authorities. Subdivision 4 specifically referred to "a bona fide expectation of acquiring such an interest."

See also

Columbian Ins. Co. v. Lawrence, 10 Pet. 507, 9 L. Ed. 512.

Provident Trust Co. v. Nat. Surety Co., 44 Fed. Supp. 514 (D. C. W. D. Pa., 1942).

Maryland Casualty Co. v. Washington Loan & Banking Co., 145 S. E. 761.

Ryan v. United States, 19 Wallace (86 U. S.) 514.

Berry v. A. C. Insurance Co., 132 N. Y. 49.

Empire Development Co. v. Title Guarantee & Trust Co., 225 N. Y. 53 (1918).

Buck v. Chesapeake Insurance Co., 1 Pet. 151.

Craufurd, et al. v. Hunter, 8 D. & D. 13.

Stock v. Inglis, 12 Q. B. 564, 571, affd. 10 A. C. 263 (H. L. 1885).

## CONCLUSION.

**It is urged, therefore, that the petition be granted for the reasons hereinbefore set forth and that the decision below is in conflict with the authorities herein cited.**

Respectfully submitted,

THEODORE E. WOLCOTT,
Counsel for Petitioner.

JAN 10 1944
CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States

**OCTOBER TERM, 1943.**

**No. 551.**

CURACAO TRADING COMPANY, INC.,
*Petitioner,*

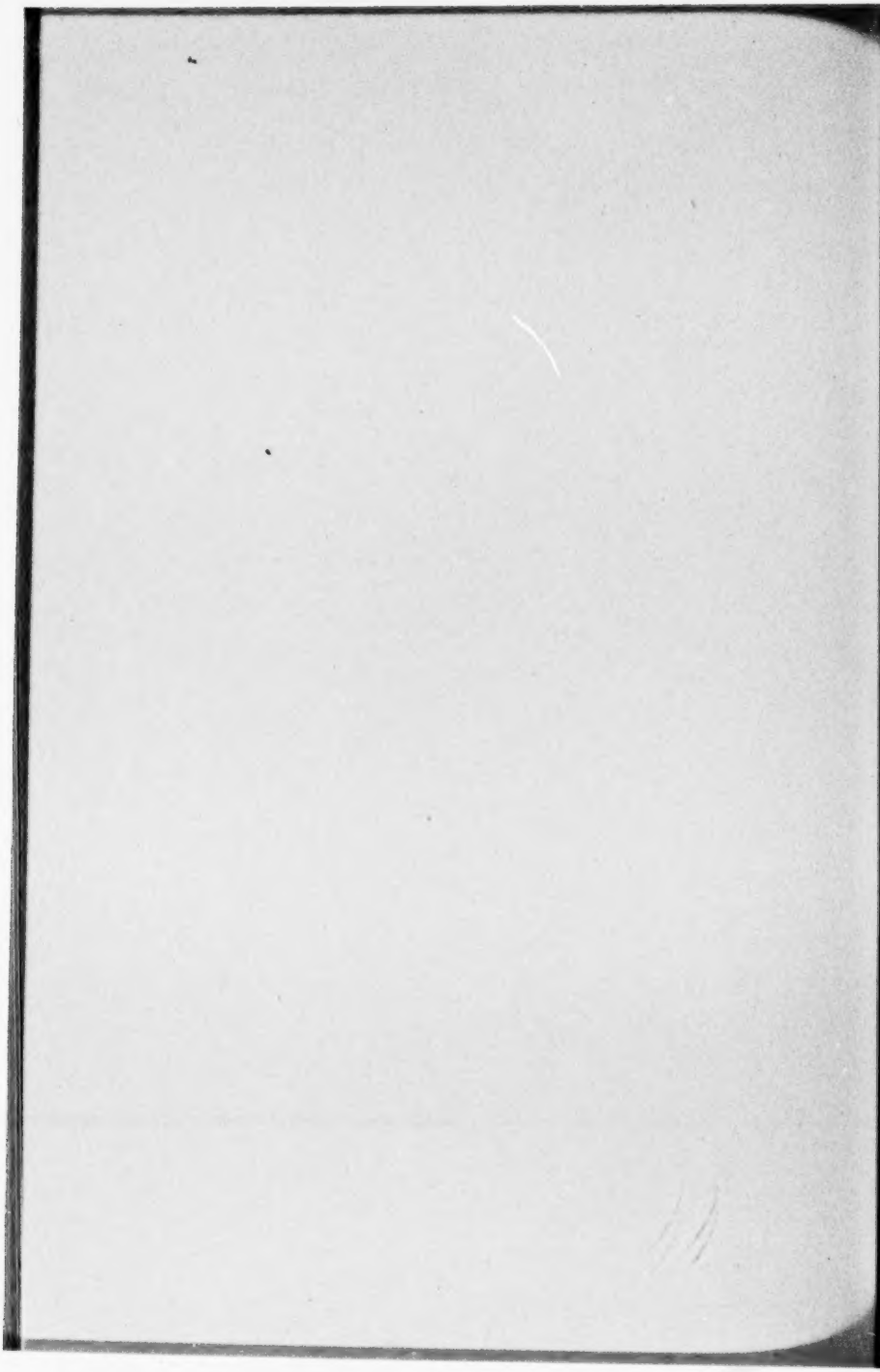
—against—

FEDERAL INSURANCE COMPANY,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GEORGE S. BRENGLE,
*Counsel for Respondent.*

BIGHAM, ENGLAR, JONES & HOUSTON,
JOHN M. AHERNE,
*On the Brief.*



# INDEX.


PAGE

Statement . . . . . 1

Undisputed Facts Established by Documentary Evidence, Court Records, Admissions and Affidavits, as the Basis of the Summary Judgment . . . . . 3

Argument . . . . . 8

POINT I—Petitioner's lack of insurable interest in the cocoa beans was established by uncontradicted documentary evidence, and prior adjudication. No genuine issue of fact remained . . . . . 8

(Answering Petitioner's Points I and II.) . . . . . 8

POINT II—The insurance contract consisted of the open policy and the certificate. Parol evidence of the broker's alleged representations was inadmissible to vary the written contract, complete on its face . . . . . 12

(Answering Petitioner's Point III.) . . . . . 12

POINT III—The subject matter of the insurance was property. The perils insured against were "all risks of physical loss or damage including non-delivery". Under Section 148 of the New York Insurance Law petitioner had no insurable interest . . . . . 15

(Answering Petitioner's Point IV.) . . . . . 15

POINT IV—This case presents no ground for the granting of a writ of certiorari . . . . . 17

Conclusion . . . . . 18

TABLE OF CASES CITED:

PAGE

*Allen et al.* v. *German-American Ins. Co.*, 123 N. Y. 6 ..... 14

*Brandyce* v. *G. & R. Fire Ins. Co.*, 252 N. Y. 69 ..... 12, 14

*Clinchy* v. *Grandview Dairy Inc.*, 283 N. Y. 39 ..... 14

*De Grove* v. *Metropolitan*, 61 N. Y. 594 ..... 14

*Drennan* v. *Sun Indemnity*, 271 N. Y. 182 ..... 14

*El Dia Ins. Co.* v. *Sinclair*, 228 Fed. 833 (C. C. A. 2) .. 14

*Fletcher* v. *Evening Star Newspaper Co.*, C. C. A., D. C., 114 Fed. (2d) 582, cert. den. 312 U. S. 694 ..... 9, 10

*French American Banking Corp.* v. *Fireman's Fund*, 43 Fed. Supp. 494 ..... 14

*Harbor Stores Corporation, In re*, 29 Fed. Supp. 749 ..... 7, 8, 9

*Harbor Stores Corporation, In re*, 33 Fed. Supp. 360 ..... 7, 8, 9

*Mitchill* v. *Lath*, 247 N. Y. 377 ..... 14

*Mord* v. *Hartford Accident & Indemnity Co.*, 245 N. Y. 279 ..... 14

*Nieschlag Co.* v. *Atlantic Mutual Ins. Co.*, 43 Fed. Supp. 797, aff'd 126 Fed. (2d) 834, cert. den. 317 U. S. 640 ..... 2, 8, 16, 17

*Northrup* v. *Piza*, 43 App. Div. 284, aff'd 167 N. Y. 578 14

*N. Y. & Oriental S. S. Co.* v. *Auto Ins. Co.*, 37 F. (2d) 461 ..... 13

*Palmer* v. *Hoffman*, 318 U. S. 109 ..... 12

*Pindar* v. *Resolute Fire Ins. Co.*, 47 N. Y. 114 ..... 14

*Royster Guano Co.* v. *G. & R. Fire Ins. Co.*, 252 N. Y. 75 ..... 12, 13

*Salzano* v. *Marine Ins. Co. Ltd.*, 173 App. Div. 275 .. 14

*Sommer, In re*, 12 N. Y. S. (2d) 47 ..... 14

*Walton* v. *Agricultural Ins. Co.*, 116 N. Y. 317 .... 14

*Wright* v. *American Equitable Assurance Co.*, 131 Misc. 215 ..... 14

OTHER AUTHORITIES CITED:

PAGE

Arnould on Marine Insurance, 12th Ed., Sec. 186... 14

New York Insurance Law:
Section 148 ..... 2, 15, 16, 17

Thayer on Marine Insurance Certificates, 49 H. L. R. 239 . . ..... 13, 14

United States Supreme Court Rules:
Rule 38 ..... 1, 17
Rule 56 (c) ..... 8, 10

Winter on Marine Insurance, (1929), pp. 56-58 and 163 . . ..... 14, 16

28 U. S. C. 695 ..... 12

# Supreme Court of the United States

**OCTOBER TERM, 1943.**

**No. 551.**

---

CURACAO TRADING COMPANY, INC.,

*Petitioner,*

—against—

FEDERAL INSURANCE COMPANY,

*Respondent.*

---

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### Statement.

The opinion of the Circuit Court of Appeals for the Second Circuit, which this Court asked to review is reported at 137 Fed. (2d) 911 and appears at pages 365-369 of the record. The opinion of the District Court is found at pages 268-274 of the record, and is reported in 50 Fed. Supp. 441. Jurisdiction rests upon diversity of citizenship.

This case presents no reason within Rule 38 for the issuance of a writ of certiorari. Contrary to the general assertions of the petition, the decisions below are not in conflict with any applicable decision of this Court, with any applicable decision of any other Circuit Court of Appeals, nor with any applicable local decision. In fact the decision below follows an almost identical summary judgment case arising out of the same warehouse fraud,

in which this Court declined to grant certiorari—*Nieschlag Co.* v. *Atlantic Mutual Ins. Co.*, 43 Fed. Supp. 797, affirmed on opinion below 126 Fed. (2d) 834, certiorari denied 317 U. S. 640.

The questions involved are simply whether parol evidence is admissible to change the nature of a pre-existing written insurance contract, complete on its face; and whether the District Court and the Circuit Court of Appeals were right in concluding that on undisputed facts, documentary evidence, and prior adjudications, there was no genuine issue of fact on the question of petitioner's lack of insurable interest in the subject matter of a policy of insurance.

Petitioner was fraudulently induced to lend money upon the security of spurious warehouse receipts. Petitioner believing the receipts to represent property actually in the warehouse took out insurance against "all risks of physical loss or damage including nondelivery". The holding below is simply that the insurance was property insurance; that petitioner had no insurable interest in the property; and that under Section 148 of the New York Insurance Law the claim must fail.

None of these questions is of general importance and none of them affect the public interest. They comprise merely, an isolated controversy between the parties to an ordinary mercantile transaction, which the Courts below have unanimously decided in respondent's favor, in accordance with the accepted and usual course of judicial proceedings.

## Undisputed Facts Established by Documentary Evidence, Court Records, Admissions and Affidavits, as the Basis of the Summary Judgment.

While the facts are quite fully stated in the opinions of the Circuit Court of Appeals and the District Court, some brief review appears necessary *first* to indicate the undisputed and documentary character of these facts, and *second* because of certain misstatements and significant omissions in the petition and brief, which the record does not support.

Long before this controversy arose, to wit, on July 24, 1925 (19)* respondent issued to petitioner, in New York, an *open* policy of marine cargo insurance. That policy continued in effect, but was rewritten and reissued on July 31, 1935. A copy is found at Tab #27. William Stake & Co., Inc. (hereinafter referred to as "Stake"), was petitioner's insurance broker on both policies. The petition asserts that Stake was the agent of respondent, but the policy provides:

> "It is a condition of this policy that William Stake & Co., Inc., are the assured's brokers and agents and that this policy shall be continuous and covers subject to its terms * * *" etc. (Tab #27, typed clause #23).

The policy covered all *import* shipments consigned to petitioner, consisting of coffee, cocoa, etc.:

> "*Against physical loss or damage from any external cause, including non-delivery,* and landing, warehousing, forwarding and/or special charges if in-

* Numbers in parentheses refer to folios of the printed record. "Tab" numbers refer to the numbered tabs of the separate volume of exhibits.

curred, all irrespective of percentage" (Tab #27, typed clause #5).*

and, being an *open* one, required petitioner to *report* all risks as soon as known, and to *declare* the amount of such risks (for premium purposes) as soon as ascertained.

The policy is extended by a typewritten endorsement (hereinafter called "the warehouse endorsement") to cover the assured's interest in imported cocoa and coffee "while temporarily detained anywhere within the limits of the United States of America * * * in stores or warehouses" against the risks of fire, lightning, etc., and also against the "all risks of physical loss or damage including non-delivery".** Under this endorsement imported merchandise in which the assured has an interest is *automatically* covered in *any* warehouse up to the amount of $75,000. For coverage in excess of $75,000 the warehouse must be approved by the underwriter (Clause #4).

The present controversy arose as follows: On March 31, 1939 petitioner made a written contract (762-773) with Garcia Sugars Corporation (hereinafter called "Garcia") in which petitioner agreed to lend Garcia $90,500, against the security of certain cocoa beans which Garcia warranted it owned "free and clear" and were stored in a licensed warehouse (763), delivery to be made by warehouse receipt; and petitioner agreed to insure the cocoa against all risks including "non-delivery" at Garcia's expense (767). Petitioner sampled certain cocoa beans located in Harbor Stores Warehouse at Long Island City, New York, (complaint 631-632). The loan was made, and on April 3, 1939 Garcia delivered to petitioner three warehouse receipts (Tabs #23, 24, 25).

* All italics ours unless indicated otherwise.

** The warehouse endorsement is the fourth typewritten page of Tab #27, and contains twelve clauses numbered 1 to 12.

Petitioner borrowed the money from the Grace Bank and had to supply the bank with evidence of insurance on the merchandise (Trust Receipt, Tab #28, Clause 6). Petitioner therefore caused a certificate of insurance to be issued under the open policy.

The certificate (Tab #26) is dated April 3, 1939. On its face the relevant provisions are:

> "This is to certify that on April 3, 1939 this Company insured under policy No. 054711 for Curacao Trading Company, Inc. on 18,480 bags Cocoa Beans * * * Located at Harbor Stores Corporation * * * from April 3, 1939 to date or dates of removal * * * loss is payable * * * to Grace National Bank &/or The Assured, as interest may appear * * *. Subject to terms and conditions of the policy against physical loss or damage from any external cause, including non-delivery" (Tab #26).

and on the back was contained a description of the cocoa beans and the warehouse receipts. The certificate was accepted and retained by petitioner without question or objection (79, 92). No certificate of insurance was necessary for coverage under the open policy. That coverage is automatic. The certificate was needed only as evidence to the bank that the open policy was in effect and would apply in accordance with its terms. The manner of issuing the certificate was this:

Before advancing the money to Garcia, Frans Vandervygh, co-manager of petitioner, talked to James Christie, Vice-President of Stake, several times. The time was between March 29th and March 31st (87-93, 33). Christie saw, in its unsigned form, the contract with Garcia (33) and learned the details of the loan (207). Christie then went to the office of Chubb & Son, Managers of Federal Insurance Company, and spoke to

William A. Bonner, the marine cargo underwriter (33, 45-46, 208). Cocoa to a value of $75,000 would be automatically covered under the warehouse endorsement so Christie asked Bonner if Federal would approve Harbor Stores Warehouse for coverage on cocoa beans under the Curacao open policy for approximately $100,000 (33, 45, 208). Bonner checked the filed rate card on this warehouse and said that he would approve it (33-34, 45). Christie then told Bonner a certificate of insurance would be required (209) and a declaration under the open policy would be made in due course (34, 45). Thereupon petitioner supplied Christie with the description of the cocoa beans. Christie filled in the blank certificate, countersigned it, and delivered it to petitioner (34). A copy was sent to respondent to advise it that it was at risk (35) and petitioner later reported to respondent the values thought to be at risk, and paid the premium thereon (36).

Thus the situation stood until Garcia's fraud came to light. In May 1939 petitioner's demand upon the warehouse was refused. Both Garcia and the warehouse were adjudicated bankrupt in the United States District Court, Southern District of New York (645, 647). Many other claimants made demand for their goods in the warehouse and an omnibus reclamation proceedings was instituted in the Harbor Stores bankruptcy (63-65) to require petitioner and every other claimant to prove their claims. Certain of the other claimants, to wit, General Cocoa Co., Inc., M. Golodetz & Co., Commodity Investors, Inc., and Cocoa Trading Corporation (hereinafter referred to as "adverse claimants") made claim to the lots of beans described in the warehouse receipts held by petitioner (63-64). *These adverse claimants proved on trial that they had actually deposited the cocoa beans in the warehouse, that their warehouse receipts bore dates earlier*

*than those of petitioner, and that their receipts represented goods actually placed in store.** Petitioner proved only its warehouse receipts and its loan to Garcia (65). Carlos Garcia testified that his company never had any cocoa in the warehouse (67-72). The Referee awarded the cocoa beans claimed by petitioner to the adverse claimants by four orders entered in the reclamation proceedings on July 27th and August 4, 1939. These orders appear at pages 159 to 173 of the record. Petitioner's claim was dismissed by order entered on August 8, 1939 on the grounds that petitioner was not "the owner of or entitled to the possession of any bags of cocoa beans in the warehouse". That order was reviewed by another unsuccessful claimant and was affirmed by Judge Coxe (29 Fed. Supp. 749). The following year, petitioner resettled the latter order so as to provide that the receivers and trustees never "come into possession of any bags or cocoa beans to which Curacao Trading Company, Inc. had ownership, title or interest superior to that of the" adverse claimants. Judge Goddard resettled the order for the declared reason that appellant might not be prejudiced in its claim against the Insurance Company in the present suit (see 33 Fed. Supp. 361-362 and fols. 74-75).

It was therefore established by the undisputed documentary and record evidence that petitioner never had any right, title or interest in the cocoa beans described in the insurance certificate. Indeed petitioner by Vandervygh, its Manager, admits that the warehouse receipts were fraudulently issued (896). It was upon such a

* See Referee Ehrhorn's certificate in Bankruptcy No. 74017 and Judge Coxe's opinion in 29 Fed. Supp. 749; also folios 63-65. All testimony, exhibits, pleadings, orders, etc., in the reclamation proceedings were incorporated by reference in the moving papers on this summary judgment motion, folios 438, 446.

clear record that the Courts below decided that there was no "genuine issue as to any material fact" and granted summary judgment in accordance with Rule 56 (c). In doing so the Courts below followed an almost identical case arising out of the same fraud. *Nieschlag Co. v. Atlantic Mutual Ins. Co.*, 43 Fed. Supp. 797, affirmed 126 Fed. (2d) 834, certiorari denied 317 U. S. 640.

## Argument.

Petitioner's argument advances four propositions which we shall answer in the same order.

## POINT I.

**Petitioner's lack of insurable interest in the cocoa beans was established by uncontradicted documentary evidence, and prior adjudication. No genuine issue of fact remained.**

**(Answering Petitioner's Points I and II.)**

Petitioner's Point I complains that it was denied a trial upon the issue of its ownership of the cocoa beans described in the warehouse receipts and the certificate of insurance. Both the District Court and the Circuit Court of Appeals held that on this question there was no "genuine issue" of fact.

It will be remembered that, before this summary judgment motion was made, petitioner had fully litigated this very issue, *i. e.*, its ownership of these cocoa beans, to a final adjudication in the same District Court. The end result of that litigation is reported in *In re Harbor Stores Corporation*, reported in 29 Fed. Supp. 749, and in 33 Fed. Supp. 361. There, upon the strictest common law

proof, it was adjudicated that cocoa beans described in petitioner's warehouse receipts were the property of other claimants who (or whose predecessors in title) actually deposited the cocoa in the warehouse. The orders of the Bankruptcy Court awarding the cocoa to the true owners are printed at pages 159-173 of the record. When those orders were taken up for review by another unsuccessful claimant (Clinton Trust Company) they were affirmed by the District Judge (29 Fed. Supp. 749). On petitioner's motion to resettle the order which dismissed its claim, the District Judge again held that "these (petitioner's) warehouse receipts were fraudulently issued"; that "the Referee, after hearings, awarded the cocoa to other claimants—the ones who actually deposited the cocoa in the warehouse" (*In re Harbor Stores Corporation*, 33 Fed. Supp. 360, 361). The latter proceeding was instituted by petitioner solely, as the opinion indicates, that its claim in the case at bar might not be prejudiced, and prejudiced it was not. In the instant case petitioner was given every opportunity to adduce further proof that it had an interest in the cocoa but it failed to do so. The facts before the Court on this motion were identical with those before it on the prior adjudication.

All the testimony, exhibits, pleadings, orders of these prior adjudications were before the Court on this motion. They were summarized in the moving affidavits (62-76, 435-439, 446-475), and were expressly incorporated therein by reference (438, 446, 66). The Court, moreover, was required to give judicial notice to its own prior adjudication (*Fletcher* v. *Evening Star*, C. C. A., D. C., 114 Fed. (2d) 582, 587, certiorari denied 312 U. S. 694).

We do not contend, and neither did the Courts below hold, that the prior adjudication was technically *res adjudicata*. It could not be because respondent was not

a party to it. But we do say that petitioner cannot raise a *genuine issue* of fact (Rule 56 (c)) by striving to relitigate in a new action the precise question once decided against it; especially when no new facts are produced, and when the undisputed facts so compellingly demonstrate that the same result must be reached. It is the office of the summary judgment motion to penetrate such fictitious issues and put an end to futile litigation.

> "Our previous decisions are not technically *res judicata* as between appellant and appellee, since the latter was not a party to any of the prior proceedings. But those determinations are conclusive against appellant, unless we are now to repudiate what we have done repeatedly and consistently whenever the issues involved in them have been raised." (*Fletcher* v. *Evening Star Newspaper Co.*, 114 Fed. (2d) 582, 583, certiorari denied 312 U. S. 694.)

But respondent's position does not rest solely upon the prior adjudications. This whole record demonstrates conclusively the absence of any "genuine issue as to any material fact" (Rule 56 (c)).

Petitioner's claim of interest in the cocoa beans rests solely and exclusively upon its contract with Garcia (762-773) and the naked warehouse receipts. It is admitted that petitioner never deposited a pound of cocoa in the warehouse. Carlos Garcia, President of Garcia Sugars Corporation, signed the contract with plaintiff (773). He pleaded guilty to criminal charges of fraud and is in States Prison (73). Garcia testified in the reclamation proceeding (66). His testimony there was uncontradicted, and corroborated by the warehouse records. He swore that he had defrauded petitioner, and that the cocoa supposed to be represented by petitioner's warehouse receipts never was in the warehouse. This testimony is quoted at folios 67-72 of the record.

Complete and detailed corroboration of Garcia's testimony, and of the prior adjudications, was before the Court in the form of the original records of the warehouse. It will be noted that the bags of cocoa claimed by petitioner are identified by certain bag (identifying) marks (see Tabs #23, 24 and 25) which appear on the warehouse receipts. These marks connect the warehouse receipts to the particular bags they are issued against. At the time of this motion the original warehouse records were in the custody of the Court, having been placed in the safekeeping of its officer, the Trustee in Bankruptcy of Garcia Sugars Corporation (446). These original records were examined by counsel for petitioner and for respondent, and by the secretary of the warehouse, for purposes of this motion (437). Based upon such examination the secretary of the bankrupt warehouse made an affidavit (440-476) in which, as the District Judge said (805-806), he traced every ounce of cocoa beans bearing the marks which appeared on petitioner's receipts, from the time such cocoa was deposited in the warehouse down to the date of the bankruptcy, and the records proved that every bag claimed by petitioner was covered by a prior warehouse receipt issued to the persons who actually deposited the cocoa (440-476). The cocoa petitioner claimed was then traced into the four reclamation orders by which the bankruptcy court awarded it to its true owners (477-517).

Petitioner's submission on this motion offered not one whit of evidence contradicting the plain state of this record proof. It offered merely a subsequent affidavit by the warehouse secretary, Mr. McMackin (591-604), to the effect that he had no personal knowledge of the physical facts recorded in the warehouse records. The records were *warehouse* records made in the regular

course of the *warehouse* business (443), and the District Judge so found (805). They record the deposit and withdrawals of property, the issuance and surrender of receipts (443), and intrinsically evidence the established warehouse routine. They fulfill all the requirements of 28 U. S. C. 695. They were clearly admissible. *Palmer v. Hoffman*, 318 U. S. 109.

This overwhelming weight of record and documentary proof drew nothing but naked and unsupported denials from petitioner. Obdurate and persistent denial of record facts does not create a genuine issue of fact, and that is all the Courts below held on this point.

## POINT II.

**The insurance contract consisted of the open policy and the certificate. Parol evidence of the broker's alleged representations was inadmissible to vary the written contract, complete on its face.**

**(Answering Petitioner's Point III.)**

It was obvious from the written insurance contract and from the documentary proof that petitioner's claim must fail unless it could change the nature of the insurance contract by parol evidence. That is what petitioner sought to do below, and that is what both courts held could not be done.

The open policy of insurance held by petitioner (Tab #27) dates back to July 31, 1935. The insurance certificate (Tab #26) was issued "under" and "subject to the terms and conditions of the policy". The policy and certificate are one, and constitute the insurance contract. *Brandyce v. G. & R. Fire Ins. Co.*, 252 N. Y. 69, 72; *Royster Guano Co. v. G. & R. Fire Ins. Co.*, 252 N. Y.

75; *N. Y. & Oriental S. S. Co. v. Auto Ins. Co.*, 37 F. (2d) 461. And see Thayer on Marine Insurance Certificates, 49 H. L. R. 239.

The certificate here in question was issued on April 3, 1939. It was accepted and retained by petitioner without question or objection (79, 92) as the Circuit Court of Appeals noted in its opinion (R., p. 367). It was not until after the fraud became known that petitioner claimed that the insurance contract rested partly on parol (941).

The parol evidence which the Courts below excluded was certain alleged "representations" claimed to have been made in a conversation between the insurance broker (James A. Christie, Vice-President of Wm. Stake & Co., Inc.) and petitioner's co-manager (635-638). This evidence, respondent contended and the Courts below held, was inadmissible for the following reasons:

(1) Aside from the parol evidence rule the alleged conversations were not binding upon respondent because the policy provides:

> "It is a condition of this policy that Wm. Stake & Co. Inc. are the assured's broker and agents and this policy shall be continuous * * *" (Tab #27, Type clause #23).

and Stake was therefore, by contract, petitioner's own agent. Additionally the Insurance Department of the State of New York certified to the District Court that Stake was not the licensed agent of respondent (see Certificate Tab #1).

(2) Stake was admittedly petitioner's insurance broker, having placed for petitioner some 102 policies with other insurance companies in the last ten years (17-18), a list of such policies appearing at Tab #2. It is the un-

questioned law of New York that the insurance broker is the agent of the assured. *Allen et al. v. German-American Ins. Co.*, 123 N. Y. 6; *Mord v. Hartford Accident & Indemnity Co.*, 245 N. Y. 279; *Clinchy v. Grandview Dairy Inc.*, 283 N. Y. 39, 43; *Northrup v. Piza*, 43 App. Div. 284, affd. 167 N. Y. 578; *Wright v. American Equitable Assurance Co.*, 131 Misc. 215, 218; *In re Sommer*, 12 N. Y. S. (2d) 47, 49; *Salzano v. Marine Ins. Co. Ltd.*, 173 App. Div. 275, 281-282.

(3) Even assuming Stake had some kind of authority, there is absolutely no evidence in the record that Stake had authority to bind risks for respondent, or by parol or otherwise, to change the nature of its written contracts of insurance. *Drennan v. Sun Indemnity*, 271 N. Y. 182; *Allen v. German-American Ins. Co.*, 123 N. Y. 6; *De Grove v. Metropolitan*, 61 N. Y. 594.

(4) Even assuming the alleged statements were made and that the broker had authority to make them, they were properly excluded under the parol evidence rule. *Mitchill v. Lath*, 247 N. Y. 377, 379, 380-381; *El Dia Ins. Co. v. Sinclair*, 228 Fed. 833 (C. C. A. 2); *Walton v. Agricultural Ins. Co.*, 116 N. Y. 317, 322; *Pindar v. Resolute Fire Ins. Co.*, 47 N. Y. 114, 117-118.

(5) The counter-signature of the certificate by Stake did not *create* insurance. It merely certified that the existence of insurance under the automatic coverage provisions of the open policy (Arnould on Marine Insurance, 12th Ed., Sec. 186; *French American Banking Corp. v. Fireman's Fund*, 43 Fed. Supp. 494; Winter on Marine Insurance, 1929, pp. 56-58; Thayer on Marine Insurance Certificates, 49 H. L. R. 239; *Brandyce v. G. & R. Ins. Co.*, 252 N. Y. 69). Authority to countersign such a certificate therefore was merely authority to certify

to the existence of insurance under the open policy and no more. Such authority contained its own limits and it is self-evident that authority to certify to the existence of insurance under a given policy does not include authority to make a new contract at variance with such policy.

What petitioner really sought to do by parol was to change the nature of the written contract from "property insurance" into a bond guaranteeing the warehouseman's obligation to deliver (R., p. 368). It is significant that respondent's charter powers do not extend to the issuance of such bonds (see Charter Tab #5 and License Tab #6). The New York Insurance Department so certified to the District Court (Certificate Tab #7). The record presented no "genuine issue of fact" on these matters.

## POINT III.

**The subject matter of the insurance was property. The perils insured against were "all risks of physical loss or damage including non-delivery". Under Section 148 of the New York Insurance Law petitioner had no insurable interest.**

### (Answering Petitioner's Point IV.)

It is solely because one of the insured perils was "non-delivery" that petitioner is able to confuse and obscure the simple and well-settled principles of insurance law decided below. If this loss had been caused by another peril—say fire, non-coverage would be a self-evident and immediate conclusion. Here however the property was insured, not only against all risks of physical loss, but also against the risk of "non-delivery". This has enabled petitioner to argue that the "non-delivery" peril con-

stituted title insurance; that it warranted the very existence of, and title to, the goods which were insured. That argument can be made only if every other word in the policy and the certificate is ignored. But that is just what petitioner does here. The District Court adequately answered this in its opinion at folios 812-817, and we need not repeat it here. The Circuit Court of Appeals said to give assent to petitioner's argument would change the nature of the insurance from property insurance to a guaranty of the warehouseman's obligation to deliver non-existent property (R., p. 368).

The meaning of the "non-delivery" peril in a contract of marine insurance is clear. It is common knowledge that ocean carriers and warehousemen sometimes fail to deliver the goods entrusted to them. Because of the bailment it is frequently impossible for an assured to prove the exact nature of the peril which, under such circumstances, caused the loss. Therefore underwriters have designated mere "non-delivery" as an insured peril. (See Winter on Marine Insurance (1929), page 163, and see also *Nieschlag Co.* v. *Atlantic Mutual Ins. Co.*, 43 Fed. Supp. 797.) It is clear therefore that "non-delivery" as an insured peril must have a subject matter (insured goods) upon which to operate. Here the subject matter was absent.

The New York Insurance Law, Section 148, forbids the enforcement of an insurance contract unless insurable interest exists. It provides:

> "§148. Insurable interest in property.—No contract or policy of insurance on property made or issued in this state, or made or issued upon any property in this state, shall be enforceable except for the benefit of some person having an insurable interest in the property insured. The term 'insurable interest,' as

used in this section, shall be deemed to include any lawful and substantial economic interest in the safety or preservation of property from loss, destruction or pecuniary damage."

It is not questioned here that petitioner had no "lawful and substantial economic interest in the safety or preservation" of the 18,480 bags of cocoa beans described in the insurance certificate, which had already been adjudicated as wholly owned by others. There was therefore nothing upon which the "non-delivery" peril could operate.

## POINT IV.

### This case presents no ground for the granting of a writ of certiorari.

Despite petitioner's general statements, the petition and brief fail to name a single applicable decision of a Circuit Court of Appeals, or of the local Courts, with which the instant case is in conflict. None of the grounds for the granting of a writ, set forth in Rule 38, is found in this record. Quite the contrary this Court has already declined to grant certiorari to the Second Circuit Court of Appeals in an almost identical case, which arose out of the same warehouse fraud, and in which the Court granted summary judgment.

> *Nieschlag Co.* v. *Atlantic Mutual Ins. Co.*, 43 Fed. Supp. 797, affirmed 126 Fed. (2d) 834, certiorari denied 317 U. S. 640.

## CONCLUSION.

**It is respectfully submitted that the petition for a writ of certiorari is without merit and should be denied.**

Dated: January 10, 1944.

Respectfully submitted,

GEORGE S. BRENGLE,
*Counsel for Respondent.*

BIGHAM, ENGLAR, JONES & HOUSTON,
JOHN M. AHERNE,
*On the Brief.*

(11)

FILED
JAN 29 1944
CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1943.

No. 551.

CURACAO TRADING COMPANY, INC.,
*Petitioner,*

against

FEDERAL INSURANCE COMPANY,
*Respondent.*

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

GEORGE C. DIX,
*Counsel for Petitioner,*
60 Wall Street,
New York City.

GUSTAVE SIMONS,
THEODORE E. WOLCOTT,
*of Counsel.*

## INDEX.


| | PAGE |
|---|---|
| Statement | 1 |
| POINT I.—The finding below of lack of title in physical goods was not established by the reclamation order | 1 |
| POINT II.—The finding below of lack of title in physical goods was predicated upon documents neither offered nor admissible in evidence | 3 |
| POINT III.—There is a conflict between the decisions of different Circuit Courts on the issue of law involved | 10 |
| Conclusion | 11 |


## TABLE OF CASES.


| | |
|---|---|
| Aetna Casualty & Surety Co. v. National Bank of Tacoma, 59 F. (2d) 493 | 11 |
| Banco De Espana v. Fed. Res. Bank of N. Y., 114 Fed. (2nd) 438, 445 | 5 |
| Boerner v. United States, 26 Fed. Supp. 769 | 5 |
| Brown v. Fletcher's Estate, 210 U. S. 82 | 2 |
| In re Byoir & Associates, Inc. v. Tsune-Chi-Yu, 36 Supp. 963 | 5 |
| Currey v. Mackenzie, 239 N. Y. 267, 269 | 5 |
| Evans v. Rogers, 159 N. Y. S. 898 | 6 |
| Fletcher v. Evening Star Newspaper Co., 114 Fed. (2d) 582, 583, certiorari denied, 312 U. S. 694 | 2 |
| Gardenswartz v. Equit. L. Ass. So. of U. S., 68 Pac. (2nd) 322 | 5 |

PAGE

In re Harbor Stores Corporation, 33 Fed. Sup. 360, 362 2

Hoffman v. Palmer, 129 Fed. 2, 976, 981, affd. U. S. Supreme Ct., 63 Sup. Ct. 477 6

Houghton Mifflin Co. v. Stackpole Sons, Inc., et al., 113 Fed. (2nd) 627, 628 (C. C. A. 2) 5

Ingersoll v. Coram, 211 U. S. 335 2

Johnson v. Lutz, et al., 253 N. Y. 124, 128 7

Kittredge v. Grannis, et al., 236 N. Y. 375 7

Neff v. Palmer, 131 Misc. 671 5

Nickelson v. Nestles Milk Products Corp., Inc., 5 Cir. 107 F. 2d 17 10

Perrine v. Hotchkiss, 58 Barb. 77 6

Rathbone v. Hatch, 80 App. Div. 115 6

Matter of Roge v. Valentine, 255 App. Div. 475; 280 N. Y. 268 7

Sonken-Galamba Corporation, et al. v. Atchison, T. & S. F. Ry. Co., 28 F. Supp. 456 6

Troxell v. Delaware, Lackawanna & Western R. R. Co., 227 U. S. 443 2

United States v. Newbury Mfg. Co., et al., 1 Fed. Rules Dec. 718 10

Williams & Morford Co. v. Stokes, 158 N. Y. S. 89 6

## STATUTES.

Civil Practice Act, Section 374a 7

Richardson on Evidence, Sec. 205 4

Wigmore on Evidencee, Fourth Edition, Section 1523 6

# Supreme Court of the United States

OCTOBER TERM, 1943.

**No. 551.**

CURACAO TRADING COMPANY, INC.,

*Petitioner,*

against

FEDERAL INSURANCE COMPANY,

*Respondent.*

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### Statement.

The brief in opposition to this petition for a writ of certiorari itself establishes the issues upon which petitioner is entitled to the relief which it seeks.

### POINT I.

**The finding below of lack of title in physical goods was not established by the reclamation order.**

The Reclamation Order was in a proceeding to which the respondent was in no way a party and in which it had no interest and by which it was not bound.

(a) The Reclamation Order did not constitute competent evidence in this action because it was between different parties:

> *Brown* v. *Fletcher's Estate*, 210 U. S. 82;
> *Ingersoll* v. *Coram*, 211 U. S. 335;
> *Troxell* v. *Delaware, Lackawanna & Western R. R. Co.*, 227 U. S. 443.

(b) The original Reclamation Order was resettled by the District Court for the express purpose of limiting its effect to the Reclamation Proceeding and excluding it from consideration in this action (see, In re Harbor Stores Corporation, 33 Fed. Sup. 360, 362), in which Judge Goddard held:

> "* * * the determination of the Referee was limited to a finding that the petitioner (Curacao Trading Company) has no rights in the property sought to be reclaimed equal to or superior to that of the successful claimants. * * * It may have some rights although not as against the true owners and it ought not to be prejudiced by the recitals contained in the degree of August 8, 1939 in a determination of these rights in another proceeding."

(c) The case of *Fletcher* v. *Evening Star Newspaper Co.* (114 Fed. [2d] 582, 583, certiorari denied, 312 U. S. 694), upon which the respondent heavily relies and which it quotes at page 10 of its opposition brief, does not destroy the limitation upon the doctrine of res adjudicata or overcome the objections mentioned in (a) and (b) above. The *Fletcher* case was decided by Mr. Justice Rutledge of this Court, then sitting as Associate Justice of the United States Circuit Court of Appeals for the District of Columbia. In that case the appellant sued in a libel action because the respondent had referred to his disbarment and the respondent relied upon an adjudication of disbarment to

establish the truth of what it said. Upon this narrow issue, it was held that the doctrine of res adjudicata did not apply. What was really involved was akin to privilege which is limited to libel actions. A newspaper, reporting a judicial proceeding is naturally not to be limited to the strict principles of res adjudicata in determining its responsibility in libel else this type of privilege would be vitiated. What was held in that case was quite properly that the doctrine of res adjudicata did not apply. In this case, however, it is the respondent who relies on res adjudicata and is bound by its limitations.

## POINT II.

**The finding below of lack of title in physical goods was predicated upon documents neither offered nor admissible in evidence.**

It is true that Garcia has testified that the cocoa represented by the petitioner's warehouse receipts was not in the warehouse. Such testimony, however, was not in this case but in the Reclamation Proceeding. Even there, it does not appear that Garcia had any personal knowledge as to what was in the warehouse. On the contrary, cocoa beans answering the description contained in petitioner's certificates were actually received, counted, sampled and graded on behalf of petitioners. (See *Marcone Report*, *Vanderveygh* Ex. 3, 160, *Kehrer*, 172, 177.)

Garcia's testimony and the respondent's assertions are directly put in issue by the warehouse receipts which were executed by the secretary of the warehouse corporation and constituted presumptive evidence of the existence of the cocoa beans and of the validity of petitioner's interest therein. The respondent's entire proof on this point did not rest on warehouse records, but upon the incompetent hearsay affidavit of John J. McMackin, former secretary of the defunct Harbor Stores Corporation. The

choice of McMackin to allege invalidity of the warehouse receipts was a desperate choice of last resort for it was McMackin himself who issued and signed the warehouse receipts in question. Thus, we have the strange situation of (a) the respondent submitting one McMackin affidavit dated May 26, 1942 (McMackin Reply Aff., 440-476), (b) the petitioner a few days later submitting an affidavit in rebuttal thereto by the same McMackin (McMackin Rebuttal Aff., 591-606) in which he absolutely contradicts himself on every count and (c) the lower Court arbitrarily accepting the respondent, McMackin, against the petitioner, McMackin.

The respondent's McMackin affidavit was purely hearsay and inadmissible since McMackin had no personal knowledge of the facts therein contained or as to the ownership of the particular cocoa beans he described. The best evidence was the records themselves (*Richardson on Evidence,* Sec. 205), yet those records were not even introduced into evidence by the respondents. There is no statement in the affidavit that McMackin had personal knowledge or that the books and records were kept under his direction. It should be noted that Harbor Stores Corporation is a successor to Insular Terminal Corporation upon whose alleged records the prior history of the so-called other warehouse receipts rests. McMackin is in no better position to speak of those records than any man in the street because, as he says, "As far as the original Insular Terminal warehouse receipts are concerned, I was not an officer of that corporation and did not execute any of the same and I have no personal knowledge as to the accuracy or validity of said warehouse receipts." The same thing is said of the other records (602-603).

In the petitioner's McMackin affidavit, McMackin says that the records were not made up by him or in his presence or under his supervision and, "I have no personal knowledge of how they were made up, nor do I have any knowledge of their accuracy" (599-600). He

clearly states (599-600), "I had nothing to do with checking in the cocoa, nor did I have any duties to perform at the warehouse in Long Island City, nor did I actually perform any acts at the warehouse, other than installing a boiler there in 1938. The warehouse was in Long Island City. I was at the Manhattan office of the Insular Terminal Corporation, 99 Wall Street."

Despite the above facts, the district Judge says of these alleged records: "They speak for themselves and, being kept in the regular course of business, are entitled to recognition as evidence and they stand uncontradicted in any respect whatever by any allegation of fact made in any of the plaintiff's affidavits" (807).

*We challenge the respondent to point out where these alleged records appear in this record.* They neither did nor do. Therefore, the finding of the Court below seems almost incredible and, as the alleged records are the keystone of the decision, reversal is clearly demanded. *Boerner* v. *United States*, 26 Fed. Supp. 769; *Banco De Espana* v. *Fed. Res. Bank of N. Y.*, 114 Fed. (2nd), 438, 445; *In re Byoir & Associates, Inc.* v. *Tsune-Chi-Yu*, 36 Supp. 963 —where the Court held that where veracity is in issue summary judgment must be denied.

The respondent's McMackin affidavit was not the best evidence of the contents of the record. The records themselves should have been produced. *Neff* v. *Palmer*, 131 Misc. 671; *Gardenswartz* v. *Equit. L. Ass. So. of U. S.*, 68 Pac. (2nd) 322; *Currey* v. *Mackenzie*, 239 N. Y. 267, 269 (Cardozo, J.). Yet, the respondent made no attempt to produce any original papers or to tender any reason or excuse why they were not produced. On the contrary, without proper foundation it relied on the McMackin affidavit which, even as secondary evidence, only insufficiently referred to book entries and other records and lacked the required attestation of personal knowledge. *Houghton Mifflin Co.* v. *Stackpole Sons, Inc., et al.*, 113 Fed. (2nd) 627, 628 (C. C. A. 2).

Apart from the requirements of Rule 56, defendant's alleged proof on the above issue violates every known rule of evidence. In the first place, there is enough in the record to indicate that some doubt must be thrown on the honesty and accuracy of the warehouse records generally. An affidavit by Joseph J. Millman, an accountant, was submitted by petitioner which gave documented proof of the inaccuracy of the warehouse records relied upon by respondent (607-627).

Even if the records had been admitted in evidence, cross-examination would have been necessary to test their veracity. However, it is obvious that there is no proof that the non-existent records were ever made in the regular course of business. As was said in *Wigmore on Evidence, Fourth Edition,* Sections 1523, et seq., there must be proof that records were made in the regular course of business, contemporaneously with the transaction and with no motive to misrepresent,—all of which elements are not present here. Further, personal knowledge of the entrant must be shown (Sec. 1530); the original books must be produced (1532); and the books must have an honest appearance and "no suspicion of false dealing must be apparent" (1551). These principles were approved by this Court recently in *Hoffman* v. *Palmer,* 129 Fed. 2, 976, 981, aff'd. U. S. Supreme Ct., 63 Sup. Ct. 477; *Evans* v. *Rogers,* 159 N. Y. S. 898. Alleged warehouse entries were involved in *Williams & Morford Co.* v. *Stokes,* 158 N. Y. S. 89, and were rejected because they were not the original entries.

Furthermore, there is not an iota of proof that the cocoa beans claimed to be owned by others are the identical cocoa beans involved in the Garcia transaction. *Sonken-Galamba Corporation, et al.* v. *Atchison, T. & S. F. Ry. Co.,* 28 F. Supp. 456. Books to prove third party transactions are inadmissible. The books must relate to transactions between the parties, as was held in *Perrine* v. *Hotchkiss,* 58 Barb. 77. See, also, *Rathborne* v. *Hatch,* 80

App. Div. 115; *Matter of Roge* v. *Valentine*, 255 App. Div. 475 (reversed on other grounds, 280 N. Y. 268); *Kittredge* v. *Grannis, et al.*, 236 N. Y. 375. The New York Court of Appeals in interpreting Section 374a of the Civil Practice Act referring to book entries, which is similar to the Federal Statute, said:

> "It was not intended to permit the receipt in evidence of entries based upon voluntary hearsay statements made by third parties not engaged in the business or under any duty in relation thereto." (*Johnson* v. *Lutz, et al.*, 253 N. Y. 124, 128.)

The very claim of conflicting receipts urged by respondents, the two contradicting McMackin affidavits, and the conflicting records of Harbor Stores all compel the rejection of the respondent's proof which at best created an issue.

Therefore, attention is particularly directed to the certificate of insurance, issued by the respondent, confirming its issuance in favor of the petitioner, and included in the separate volume of exhibits submitted to this Court, to wit:

"$112,644.80—As per specifications— No. F532685

FEDERAL INSURANCE COMPANY,
90 John Street, New York, N. Y.
CHUBB & SON, Managers

New York, April 3, 1939

THIS IS TO CERTIFY that on April 3, 1939 this Company insured under policy No. O-54711 for CURACAO TRADING COMPANY, INC. on 18,480 bags Cocoa Beans valued at market value on date of loss, as per back hereof located at Harbor Stores Corporation, #4460-#4486—5th Street, Long Island City, N. Y. from April 3, 1939 to date or dates of removal and it is hereby understood and agreed that, in the case of loss, such loss is payable only in New

York to GRACE NATIONAL BANK &/or THE ASSURED, as interest may appear on surrender of this certificate.

This Certificate represents and takes the place of the policy as fully as if the property were covered by a special policy subject to such risks and conditions as shown in the margin hereof and conveys all the rights of the original policyholder (for the purpose of collecting any loss or claim) direct to the holder of this Certificate and free from any liability for unpaid premiums.

In the event of the cancellation of the policy or endorsement under which this Certificate is issued, this Certificate is hereby cancelled upon notification to the holder prior to the expiration date shown thereon.

Not Valid Unless Countersigned By

WILLIAM STAKE AND COMPANY, INC,

Countersigned

WILLIAM STAKE AND COMPANY, INC.
William Stake & Co., Inc. (red stamp)
S. MILLER (Sgd.)
Atty. in Fact (red stamp)"

The issuance of said certificate is proof conclusive that, in the contemplation and intent of the respondent, the petitioner had insurable title in and to the cocoa stored with Harbor Stores Corporation.

Furthermore, against the respondent's proof stands the warehouse receipt (included in the separate volume of exhibits) which is for the same guaranty of cocoa referred to in the respondent's own certificate of insurance (supra) and which is absolutely devoid of anything to support Garcia's claim that the cocoa in the warehouse was not the cocoa represented by said receipt. At the expense of repetition, said receipt is quoted here, as follows:

"HARBOR STORES CORPORATION
LONG ISLAND CITY

| | | |
|---|---|---|
| WAREHOUSE RECEIPT #00216 | | MARKED |
| 1700 Bags Cocoa | 1000 | GC<br>Superior<br>#33 |
| | 700 | GC<br>Superior<br>#33 |
| Stores #1B and 2 | | |
| WAREHOUSE RECEIPT #00215 | | MARKED |
| 15,000 Bags Cocoa | 3000 | GBOA<br>Gold Coast |
| | 11000 | SUM<br>Gold Coast<br>GC |
| | 1000 | Superior<br>31 |
| Stores #1A and 2 | | |
| WAREHOUSE RECEIPT #00217 | | MARKED |
| 1780 Bags Cocoa | 300 | Instituto<br>S.G.G. |
| | 650 | Instituto<br>S.H.H. |
| | 800 | Instituto<br>G.C.C. |
| Store #2" | | |

Cocoa bearing such marks were in the warehouse and sampled by petitioner.

Thus, it appears that the decision below was predicated upon a consideration of the rankest kind of inadmissible hearsay without an opportunity on the part of petitioner

to cross-examine or for a jury to decide the issues. Where documents establish a fact as a matter of law and destroy any issue, we concede that summary judgment is a proper remedy but the purported documents here were (a) not offered in evidence or made part of the record and (b) were clearly inadmissible as hearsay. Therefore, this is indeed a situation which demands a fair and open trial affording an opportunity for cross-examination. *Nickelson* v. *Nestles Milk Products Corp., Inc.*, 5 Cir. 107 F. 2d 17. *United States* v. *Newbury Mfg. Co., et al.*, 1 Fed. Rules Dec. 718. Otherwise, the order and judgment deprive petitioner of its Constitutional right to a jury trial upon the issues.

## POINT III.

**There is a conflict between the decisions of different Circuit Courts on the issue of law involved.**

The respondent must fail since its contention rests upon an assertion that the petitioner had no title to physical property and that the insurance involved in this case was property insurance. We have demonstrated that an issue of fact on this score exists. But, even if this issue were determined adversely to the petitioner, an issue of law still remains on which conflicting determinations have been made by different Circuits.

Huge sums of money change hands in reliance upon pledges of warehouse receipts. Creditors seek to bolster their security through insurance against non-delivery in accordance with warehouse receipts. If such insurance is invalid, in the face of the risk directly intended to be insured against (and respondent's agent to whom the petitioner turned as an expert warranted as agent for the respondent, that petitioner was receiving this protection, Point III, main brief), millions of dollars of financing will go without protection.

The case of *Aetna Casualty & Surety Co.* v. *National Bank of Tacoma*, 59 F. (2d) 493, was decided by the Circuit Court of Appeals for the Ninth Circuit. This case and its companion case in the state Court are discussed on pages 17 and 18 of the petitioner's main brief. It is directly in point and holds that insurance under circumstances similar to these is valid and enforceable, notwithstanding the non-existence of specific physical goods. This decision of the Ninth Circuit is in direct conflict with the decision of the Second Circuit in this case.

Therefore, the conflict of decisions between the Second and Ninth Circuits creates an issue of great public importance, justifying review by this honorable Court in addition to the Constitutional grounds for review pressed by the petitioner earlier in this brief.

## CONCLUSION.

**It is respectfully urged that, for the foregoing reasons, the petition be granted.**

Respectfully submitted,

GEORGE C. DIX,
Counsel for Petitioner.

GUSTAVE SIMONS,
THEODORE E. WOLCOTT,
of Counsel.